

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAUSTINO AYALA,

No. C-10-4375 TEH (PR)

Petitioner,

v.

ORDER TO SHOW CAUSE

GREG LEWIS, Warden,

Respondent.

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Petitioner, a state prisoner incarcerated at Pelican Bay State Prison in Crescent City, California, has filed a pro se Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction from San Mateo County Superior Court. Doc. #1. He has paid the \$5.00 filing fee.

I

According to the Petition, on August 11, 2008, Petitioner was sentenced to 40 years to life in state prison following his conviction by jury in San Mateo County Superior Court of second degree murder with an attached firearm use enhancement. Doc. #1 at

1 3. Petitioner sought post-conviction relief in the state appellate
2 courts until the California Supreme Court denied his petition for
3 review in 2010. *Id.* at 3. The instant federal Petition for a Writ
4 of Habeas Corpus followed.

6 II

7 This Court may entertain a petition for a writ of habeas
8 corpus "in behalf of a person in custody pursuant to the judgment of
9 a State court only on the ground that he is in custody in violation
10 of the Constitution or laws or treaties of the United States." 28
11 U.S.C. § 2254(a). It shall "award the writ or issue an order
12 directing the respondent to show cause why the writ should not be
13 granted, unless it appears from the application that the applicant
14 or person detained is not entitled thereto." *Id.* § 2243.

15 Petitioner seeks federal habeas corpus relief by alleging
16 the following three claims: (1) denial of his right to a trial by
17 jury when the trial court improperly removed a "holdout" juror; (2)
18 denial of his right to due process because there was insufficient
19 evidence to support his second degree murder conviction; and (3)
20 denial of his right to a jury trial on the gang enhancement
21 allegation. Liberally construed, Petitioner's claims appear
22 cognizable under 28 U.S.C. § 2254 and merit an Answer from
23 Respondent. *See Zichko v. Idaho*, 247 F.3d 1015, 1020 (9th Cir.
24 2001) (federal courts must construe pro se petitions for writs of
25 habeas corpus liberally).

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III

For the foregoing reasons and for good cause shown,

1. The Clerk shall serve by certified mail a copy of this Order and the Petition, and all attachments thereto, on Respondent and Respondent's attorney, the Attorney General of the State of California. The Clerk also shall serve a copy of this Order on Petitioner.

3. Respondent shall file with the Court and serve on Petitioner, within sixty (60) days of the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the Answer and serve on Petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the Petition.

If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with the Court and serving it on Respondent within thirty (30) days of his receipt of the Answer.


4. In lieu of an Answer, Respondent may file a Motion to Dismiss on procedural grounds, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the Court and serve on Respondent an Opposition or Statement of Non-Opposition within thirty (30) days of receipt of the motion, and Respondent shall file with the Court and serve on Petitioner a Reply within fifteen (15) days of receipt of any Opposition.

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1 5. Petitioner is reminded that all communications with
2 the Court must be served on Respondent by mailing a true copy of the
3 document to Respondent's counsel. Petitioner also must keep the
4 Court and all parties informed of any change of address.

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7 IT IS SO ORDERED.

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9 DATED 02/22/2011



THELTON E. HENDERSON
United States District Judge

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